United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

TELEDYNE INDUSTRIES, INC.,

Plaintiff-Appellee,

against

ODIF PODELL, SIMON SRYBNIK, NICHOLAS ANTON, SAUL WALLER,

Defendants-Appellants,

and

EON CORPORATION and KERNS MANUFACTURING CORP.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

(Appeal from Order Denying Motion for a New Trial)

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APPELLANTS' BRIEF

PRELIMINARY STATEMENT

This is an appeal by defendants-appellants from an order of the United States District Court, Southern District of New York (Knapp, J.) denying defendants-appellants' motion for an order pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure vacating a judgment entered in favor of

the appellee and ordering a new trial upon the ground that newly discovered evidence and the interests of justice required a new trial on the merits.

ISSUE PRESENTED

Did the District Court err in failing to order a new trial or, in lieu thereof, hold a hearing on the merits of appellants' application, when appellants presented documentary affidavit proof that the transactions involved herein were inundated by commercial bribery?

FACTS

This diversity action was tried without a jury over a twelve-day period in part during July 1974 and in part during January 1975. Appellee [hereinafter sometimes "Teledyne"] sought to impose liability on the four individual defendants-appellants who were all directors and/or officers of Eon Corporation (hereinafter "Eon"), under theories of fraud, misrepresentation and conversion. The reason appellee sought to impose personal liability upon the defendants-appellants was that Eon was bankrupt.

In June 1969, Eon, through its American Marc Division [hereinafter "American Marc"] was awarded a contract by the United States Army for the manufacture, production and delivery of generator sets. (A-9) After American Marc became unprofitable, Eon's Board of Directors decided to terminate manufacturing operations at American Marc and sought to subcontract the remaining commitments under the Army contract. (A-9) In May, 1971, representatives of appellee (Coleman and Rouse) met with James Leonard [hereinafter "Leonard"], head of American Marc and a Vice President of Eon, and negotiated two agreements, one a subcontract of Eon's obligations to the Army and the other involving appellee's purchase of Eon's inventory and tooling. (A-10) Prior to this, appellee had unsuccessfully bid on a government contract for the manufacture of the same type of generator set that was being produced by American Marc, at a price approximately $30 less than what it received under the subcontract with Eon. (A-17)

It was contended by appellee and found by the District Court that as part of the contractual agreement, the parties also made certain arrangements

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*numbers in parenthesis refer to pages in the Joint Appendix.

relating to payment from Eon to Teledyne. Although not incorporated as part of the two written agreements, the District Court held that American Marc, through Leonard, had agreed to establish a "special account" at the Bank of America wherein progress payments received by Eon from the government, pursuant to the contract, would be deposited and the bank would thereafter be directed to disperse funds to Teledyne in satisfaction of its outstanding invoices.

The "special account" agreement was evidenced by a letter from Teledyne to Leonard dated May 13, 1971, a letter from Leonard to the Bank of America dated May 25, 1971 and a letter from Leonard to plaintiff dated October 9, 1971. Neither of Leonard's letters indicate that he copied any other officer or director of Eon.

On the basis of the foregoing facts, the District Court dismissed the fraud claim but held that the individual defendants-appellants were liable for converting the "trust funds" held by Eon in the "special account." The proof at trial had established that Eon

had utilized funds from the "special account" to pay other corporate liabilities and that it had defaulted on its agreement with Teledyne.*

THE NEW EVIDENCE

The existence of the "trust special account," which acted as the foundation for the conversion claim, was established at the time of trial through the testimony of appellee's three principal witnesses, Coleman, Rouse and Leonard (his deposition was read). On the basis of this testimony, and with the District Court explicitly noting that it found Coleman and Rouse's testimony "wholly credible," (A-15) the court found that the parties had intended to establish a "trust account" and that the monies which had been removed from the account belonged to Teledyne.

Throughout the trial, there was an undercurrent of illegal activities which had been participated in by Coleman, Rouse and Leonard. All three admitted that plaintiff had paid Eugene Wolper a commission of $5.00 per generator set in violation of federal law and the

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* The validity of this judgment is challenged in the companion appeal, 75 Civ. 7518.

contract agreement between Eon and the Army. (A-61) However, the District Court found that this fact, in and of itself, was not destructive to Teledyne's claim for relief. Every attempt to expand the scheme of illegal activity to include a payment by Coleman and Rouse to Leonard was vehemently denied by all three. When Wolper was questioned about this posibility at his deposition, he refused to answer and plaintiff's attorney refused to press the question. (A-13)

Defendants-appellants submitted in support of the motion for a new trial, two affidavits of Eugene Wolper, which established that Coleman, Rouse and Leonard agreed that Leonard would share in the illegal commission payment paid to Wolper. Although the agreement was for a 50/50 split (Leonard would receive $11,000), Leonard received $4,700 from Wolper. (A-21)

SUMMARY OF ARGUMENT

The new evidence has a significant impact on the findings and holdings of the District Court. It is now clear that Coleman and Rouse not only violated the

law by paying an illegal commission* to Wolper, but that the entire transaction was shaded by commercial bribery. Although the reason why Coleman and Rouse paid Leonard is actually not important, a review of some of the evidence admitted during the trial is revealing.

It is apparent from the trial evidence that Eon's Board of Directors would not have been agreeable to establishing a "trust account" or assigning the proceeds of Eon's government contract to Teledyne. (A-48-49) Thus, plaintiff achieved the desired result through undesirable means. Such a conclusion would seem reasonable under circumstances where the parties executed two extensive written documents, after conferring with counsel, but neither document mentioned the "special account" or a "trust" relationship. In fact, the purchase order contradicts the oral "trust" arrangement by specifying that payment was due 30 days from receipt of invoices. (A-15)

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* This commission was no more than a finder's fee because all Wolper did to earn the fee was arrange for Leonard to meet with Coleman and Rouse.

In addition, Teledyne's control of Leonard was evidenced by other evidence submitted on appellants' motion. Defendants-appellants' contend that Leonard was not only paid to obtain his cooperation in achieving a most beneficial subcontract in this one instance,* but that his continued cooperation was assured through the promise of future remuneration.** Submitted to the court was the affidavit of Saul Waller, which raised a serious question as to whether Leonard received payments from Teledyne after May 12, 1971. (A-30) Even if Leonard did not receive payments from Teledyne after May 12, 1971, there can be no doubt that future payments were anticipated. (Defendants' Trial Exhibit D,

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* The evidence submitted to the District Court indicated that Teledyne stood to gain approximately $250,000 additional profit over and above its original bid - $30 per unit and $30 per unit savings in start-up expenses.

** Leonard controlled at least American Marc's second-year procurement under the original contract (4,000 units).

a letter dated September 10, 1971 from Rouse to Leonard, contained Teledyne's bid for the second-year's procurement under Eon's original contract. That bid contained a $3.50 per unit ($14,000) payment to Leonard for his "consulting services.") (A-28) Under the circumstances now evident, it is clear that the payment was no more than a bribe or kickback to assure Teledyne that it would receive another profitable subcontract.

The newly discovered evidence, when considered with the evidence submitted at the trial, raises serious questions as to the propriety of the judgment rendered in favor of Teledyne.

POINT I

APPELLANTS' EVIDENCE WAS NOT CUMULATIVE, COULD NOT HAVE BEEN DISCOVERED WITH DUE DILIGENCE AND SIGNIFICANTLY AFFECTED THE TRIAL COURT'S FINDINGS

It is clear that the newly submitted evidence was not only non-cumulative of other evidence, but that it significantly affected the District Court's reliance upon the credibility of Rouse and Coleman and the creation of the "special interest" account. The impact of the new evidence is substantially strengthened when

consideration is given to other evidence submitted at the trial which, because of lack of connection, was overlooked by the District Court. For example:

(a) Defendants-appellants proved that three and one-half months after the "special account" was established, Leonard met with a representative of Teledyne who had not been privy to the contract negotiations to work out final details relating to delivery and payment. After the meeting, Leonard received a letter from Teledyne indicating that the terms of payment would be 30 days from invoicing. [Defendant's Trial Exhibit "O"] (A-23) Leonard responded on October 11, [Plaintiff's Trial Exhibit "9"] (A-25) that Teledyne was attempting to change the agreement and reiterated that payments would be made out of the Bank of America account after receipt of advance payments from the Army. These facts establish that not only was the "special account" arrangement a secret from Eon's Board of Directors, but also from the officers of Teledyne;

(b) The fact that Leonard was paid by Teledyne's representatives is highlighted by Trial Exhibit "D," a letter dated September 10, 1971 from Rouse to Leonard.

In that letter, Rouse, while bidding for American Marc's second year procurement under its government contract, stated that the bid unit price included "$3.50 per unit award for your [Leonard's] consulting fee." This letter is clear evidence that after May 12, 1971, Teledyne continued to solicit Leonard's cooperation in negotiating new subcontracts. It is reasonable to assume, in view of the evidence, that this payment reflected a continuation of the illegal relationship between Teledyne and Leonard.

Thus, not only does the new evidence deal with the recantation of the testimony of three witnesses, which Professor Moore in his Treatise has found may be in and of itself sufficient grounds to warrant a new trial, but also the question of commercial bribery. In circumstances where witnesses come forward with evidence which is material to the disseminations made at the trial, and where that testimony directly affects the testimony produced by a party's witnesses, a motion for a new trial should be granted. Stilwell Travelers Ins. Co., 327 F.29 931 (5th Cir. 1964); Levino v. Jaminson, 230 F.2d 909 (9th Cir. 1956); Anderson v. Tway, 143 F.2d 95 (6th Cir. 1944); Jones v. Penna. R. Co., 35 F. Supp. 1017 (E.D.N.Y. 1940).

POINT II

THE CONTRACT SHOULD BE RESCINDED

The newly discovered evidence reveals that Leonard received a payoff from Teledyne, which was funneled to Leonard through a third party. It is respectfully submitted that the only logical inference that can be drawn from such a payoff is that Leonard was given the money in exchange for his cooperation in establishing the "trust account" without the knowledge or permission of the other officials of Eon and in agreeing to a subcontract which gave Teledyne profits in excess of $240,000 over what Teledyne had bid to the government on its own.

Under these circumstances, by reason of Teledyne's participation in the payoff, the contract must be rescinded. Under California law, which the District Court held governed the issues, a contract may be rescinded by one party on the basis of a fraudulent omission by the other. California law on this point is codified. The California Civil Code, §1689 provides, in part:

> "b. A party to a contract may rescind the contract in the following cases:
>
> (1). If the consent of the party rescinding . . . was . . . obtained through . . . or . . . exer ised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

Here, Teledyne is "the party as to whom he rescinds" and Leonard, it is submitted, is the "other party" of the last clause since, having received the payoff from Teledyne, he is "jointly interested with" Teledyne.

Ach v. Finkelstein, 264 Cal. App.2d 667 (Ct. App. 1968) established the criteria for establishing fraud:

> "(1) a false representation, actual or implied, or the concealment of a matter of fact, material to the transaction, made falsely; (2) knowledge of the falsity, or statements made with such disregard and recklessness that knowledge is inferred; (3) intent to induce another into relying on the representation; (4) reliance by one who has a right to rely; and (5) resulting damage. All of these elements must be present if actionable fraud is found; one element absent is fatal to recovery."

It is submitted that concealment of the "trust" by Teledyne and Leonard meets the following test of

materiality, set out in Schaub v. Schaub, 71 Cal. App.2d 467, 475, 162 P.2d 966 (Dist. Ct. App. 1945):

> "As a result the fact represented or suppressed, as the case may be, is deemed material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering into the contract."

Certainly, the channeling of the government advances from Eon's control is a matter of importance to Eon.

The importance to Eon of maintaining control over the money applies in meeting the following test for reliance, set forth in Schaub at 475.

> "[The deceived party] may be relieved from his contract on proof that he would not have entered into it if he had known the facts and that performance of it would give him substantially less than he bargained for."

Furthermore, reliance may be inferred, as indicated in Thomas v. Hawkins, 96 Cal. App.2d 377, 380, 215 P.2d 495 (Dist. Ct. App. 1950):

> "[W]here the evidence justified it . . . an inference of reliance may be drawn from the circumstances which have been shown. By the basis of the foregoing, the contract and 'trust' arrangement must be rescinded."

Under all of the circumstancs, the evidence introduced sufficient illegality and fraud such that the contracts involved should be rescinded.

POINT III

THE EQUITABLE MAXIM OF CLEAN HANDS BARS PLAINTIFF'S RECOVERY

Since Teledyne perpetrated a fraud on Eon, Eon and its directors may assert the maxim that one cannot obtain relief in equity unless he comes into court with clean hands.

Appellee's action for breach of trust is an equitable action:

> "[A] court of equity is competent and open to extend relief in the enforcement of a trust and in the protection of trust funds, including an accounting. . . ." Associated Almond Growers of Paso Robles v. Wymond, 42 F.2d 1, 6 (9th Cir. 1930).

It is clear from Rosenfeld v. Zimmer, 116 Cal. App.2d 719, 722, 254 P.2d 137 (Dist. Ct. App. 1953) that California courts have applied the maxim:

> "Where it appears that plaintiff has intended to defraud another a court of equity will apply the doctrine of unclean hands, and leave the plaintiff in the position in which he is situated when he seeks the assistance of the court."

The maxim may also be applied to the conversion cause of action, an action at law.

> "We are satisfied that the doctrine of unclean hands is available in this state as a defense to a legal action." Fireboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, 227 Cal. App. 2d 675, 728, 39 Cal. Rptr. 64 (Dist. Ct. App. 1964).

POINT IV

PLAINTIFF'S ACTION FAILS BECAUSE LEONARD WAS A DOUBLE-DEALING AGENT

In Gordon v. Beck, 196 Cal. 768, 239 P.309 (1925), defendant, who was sued for the unpaid portion of the price of real estate he had contracted to purchase, alleged as an affirmative defense that the contract was invalid because defendant's agent in the transaction had also acted as plaintiff's agent, and had received a commission from plaintiff without defendant's knowledge or consent. The court stated:

> "It is well settled in this state that a principal who has no notice or knowledge of the duplicity of his agent may at his option be relieved from the obligations of the contract as against his opposing principal, who had notice or knowledge of such dual agency, either by affirmative action in rescinding the contract or by interposing such dual agency as a defense in an action to enforce the contract." 196 Cal. at 771-72.

Where, as here, Leonard acted for both his own employer, and for the Teledyne, appellants' obligations under the contract should be vitiated.

POINT V

THE DISTRICT COURT SHOULD HAVE AT LEAST HELD A HEARING WHEN PRESENTED WITH THE EVIDENCE FOR A NEW TRIAL

The two affidavits of Wolper make it explicitly clear that Rouse, Teledyne's representative, knew and participated in Leonard's sharing of Wolper's finder's fee. The only rational and logical conclusion that can be drawn from the new evidence is that Rouse agreed to pay Wolper's finder's fee, knowing that half of the fee was Leonard's. It was a convenient and rather subtle way of paying off someone without too great a risk of exposure.

Wolper's affidavits have established the following new and material facts:

(a) He advised Rouse that Leonard had his hands out for the bribe even prior to Rouse's trip to California.

(b) Contrary to Rouse's testimony at the trial, Wolper stated that he spoke to Rouse on Saturday and that he told Rouse that American Marc was offering the subcontract before Rouse came to California. During the trial, Rouse testified, rather incredulously, that he went to California not even knowing the name of the party who was offering the subcontract to Teledyne. Assuming that Rouse's testimony here was false, it was necessary to support his remaining assertions relating to the investigation that was conducted into Eon's financial condition, a stumbling block upon which the alleged special account was premised.

(c) Wolper stated that Rouse knew that he and Leonard were sharing Wolper's finder's fee and specifically admitted this knowledge to Wolper. (A-62-63)

(d) Leonard was so involved with Rouse that rather than sending the first installment of the finder's fee to Wolper, as set forth in the agreement, Rouse forwarded the check to Leonard, thus assuring that Leonard would receive his portion of the money, which Rouse contended he knew nothing about. (A-63)

(e) The possibility of a conspiracy to withhold evidence from the court was evidenced by Wolper's statement that all of the facts contained in the newly submitted evidence were presented to Teledyne's corporate attorneys, both in Detroit and in Los Angeles.

Where, as here, the newly discovered evidence established that Teledyne knew that a principal of Eon was looking for a bribe in order to insure cooperation in the formulation of a deal and where, as here, that bribe was offered and paid to defendants' representative, Leonard, the very foundation of the judgment below must crumble. At a minimum, the District Court should have conducted a hearing on the validity of the new evidence, particularly where, as here, the court relied upon the credibility of the witnesses who testified in the court's presence.

It is respectfully submitted that justice requires that a new trial be granted, at which time counsel for the appellants can examine and cross-examine the principal witnesses, attack their credibility and establish that commercial bribery inundated the entire contract.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DENYING DEFENDANTS-APPELLANTS' MOTION TO VACATE THE JUDGMENT AND FOR A NEW TRIAL SHOULD BE REVERSED IN ALL RESPECTS.

Dated: New York, N.Y.
October 25, 1976

Respectfully submitted,

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Of Counsel

Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 26TH day of OCTOBER 1976.

/s/ Frank O. Bold Dunn

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